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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO. INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON
JAMES E. ROCAP, III

MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

Attorneys for the Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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1. This Case Does Not Involve a Question of "Access" Within the Meaning of the Common Law Doctrine of Access to Judicial Records.

The respondents, like the court of appeals, cast the issue in this case as whether Mr. Nixon has made a sufficient showing of reasons to "overcome" a "long-established common law right" of the public to obtain copies of tape recordings used as evidence at a trial.

First, however, the Court must determine whether there *exists* any right, at common law or otherwise, to obtain copies of such recordings. Only if there exists such a right could a court of appeals properly compel a district court, two judges of which had refused to release the recordings for broadcast and other uses,[1] to disseminate the tapes at issue here.

In asserting such a right, the respondents repeatedly refer to the common law "right of access" to judicial and other public records. This case, however, is simply not a "right of access" case, as is conceded by respondent Warner. (Warner Br. 50.) There is no issue of "access" here because, as Warner itself recognizes, the contents of the tape recordings are not secret, they are not under seal, and they have been heard and reported on by members of the press and public who attended the trial. Warner might have added that, so far as the record shows, no one has applied for or been denied access to inspect the recordings. It is not *access* that the respondents seek, but *reproductions* of the

[1] Although both the court of appeals (Pet. App. 21a-25a) and the respondents (Warner Br. 86; NBC Br. 43, 54) speak as if Judge Gesell had exercised his presumed discretion to *release* the recordings, the fact of the matter is that he *denied* the applications. True, he rejected – erroneously, we believe – petitioner's position that the tapes should not be disseminated under any circumstances. But he was inclined to release the tapes only if "commercialization of the tapes or any undignified use of the materials [could] be minimized." (Pet. App. 44a.) No plan for dissemination of the tapes was ever proposed that satisfied these considerations, and thus Judge Gesell refused to permit their release. For the court of appeals to say (Pet. App. 21a) that the "question is whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes" is an erroneous characterization of Judge Gesell's decision.

tapes in a form suitable for broadcast and sale in the form of cassettes and phonograph records.

The respondents attempt to bring their claim within the common law "right of access" doctrine by arguing that the term "judicial records" includes subpoenaed recordings played to a trial jury, and that the term "access" necessarily includes copying. As we showed in our original brief, neither proposition is supported by the applicable case law. More fundamentally, the respondents' arguments find no sustenance in the rationale of the common law principle, which is that records of a court in a democratic society ought not to be kept secret. As stated in *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-408 (1894) (emphasis added):

> "[A]ny attempt to maintain *secrecy*, as to the records of the court, would seem to be inconsistent with the common understanding of *what belongs to a public court of record*, to which all persons have the right of access, and to its records, according to long established usage and practice."

The respondents appear to recognize that materials subpoenaed for use as evidence at a criminal trial do not thereby become the property of the court. (Warner Br. 31; NBC Br. 21.) As the tapes do not belong to the court, and as there is no question here of keeping anything secret, the respondents' claimed right to copy these recordings finds no support in the common law doctrine of access to judicial records.

2. That Subpoenaed Recordings Are in The Custody of the Clerk Does Not Establish a Public Right to Copy Them.

The respondents argue that the only "relevant consideration" for the purpose of determining a claimed right to copy is "whether an item is in the control or custody of the clerk." (Warner Br. 31; see NBC Br. 21-23.) For this proposition the respondents rely on cases stating that control of exhibits in the Clerk's custody rests with the Court, and on court rules and cases which they contend establish a right to copy exhibits. None of the authorities relied on support the respondents' contention.

In both *United States v. Monjar*, 154 F.2d 954, 958 (3d Cir. 1946), and *Allen v. Lackey*, 197 Okla. 513, 188 P.2d 215, 217 (1947), the courts observed that exhibits admitted into evidence are subject to the control of the court. Unquestionably, court control of exhibits is not only appropriate, but a practical necessity. To say that a court has control of exhibits, however, does not begin to answer the question of how that control should be exercised, which is the issue in this case. Respondents offer not one single instance in which a court's control of exhibits has been exercised to permit copying of recorded evidence for public broadcast and distribution.

Respondent NBC cites local rules of thirteen district courts for the proposition that the courts allow "any applicants the right to inspect and copy all court records, including exhibits while in the custody of the Clerk." (NBC Br. 20 n.*.) Of these thirteen, however, three (E.D. Ill. Rule 18; N.D. Ind. Rule 19; S.D. Ind. Rule 16) actually *prohibit* furnishing copies of exhibits

admitted in evidence and impounded by the clerk except to "a party to the action." Four of the cited rules (C.D. Cal. Rule 29(c); S.D. Cal. Rule 29(b); E.D. Mich. Rule 26(7); N.D. Ohio Rule 10) provide only that "the court may permit photographs of exhibits to be taken by, or under the direction of, counsel," and one (W.D. Okla. Rule 15(d)) provides that exhibits may be photographed "under the supervision of the court" for "use on appeal or otherwise." Three of the remaining four rules cited (E.D. Cal. Rule 4(b); N.D. Cal. Rule 5(c); W.D. Wis. Rule 22) make no reference whatsoever to exhibits, and the language of the final rule (D.Me. Rule 13) applies only to a "paper or record on file with the clerk, including exhibits," and hardly reflects a considered judgment that even documentary evidence subpoenaed from third parties and in the custody of the clerk may be copied as a matter of right.

The doubtful status of the claimed public right to copy even documentary exhibits is further illustrated by the cases cited by the respondents. In *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504 (D. Colo. 1902), on which respondents primarily rely, the parties to a patent case, as part of an agreement of dismissal, sought to remove all testimony and documentary exhibits on file in the action. Another company, with an interest in the patent dispute, opposed the application and applied for "a copy of the testimony taken in the case." 117 F. at 505. The court did not discuss the disposition of the exhibits, which apparently consisted of nothing more than documents attached to depositions; its holding was merely that "the application of complainant to withdraw from the files *the testimony taken in the case* is denied." 117 F. at 507 (emphasis added). In the

other cited case involving exhibits,[2] *Allen v. Lackey*, 199 Okla. 513, 188 P.2d 215 (1947), the issue was the right of the opposing party to remove and perform certain tests upon an exhibit on file in the case; the court *denied* the application, holding that the exhibit should not be released if the purpose of the tests was not to adduce material evidence in the case. 188 P.2d at 218. The only case found by any party that squarely addresses the disposition of exhibits is *King v. King*, 25 Wyo. 275, 168 P. 730 (1917), discussed at pp. 25-26 of our original brief. There the court held that certain letters that had been used as exhibits at trial, "being property after they had served their purpose as evidence," stood in the same position as other personal property and thus could not be copied by the applicant.

The respondents not only fail to cite any rule or authority establishing a right to copy exhibits such as these, but also cite not one single instance when a court has permitted copying of a voice recording in its custody.[3] The treatment traditionally given to materials

[2]Respondents NBC et al. also cite *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957), and *New York Post Corp. v. Liebowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957), for the proposition that the courts have not "limited the right to inspect and copy court exhibits to interested non-parties." (NBC Br. 24 n.*.) Neither case, however, involved or discussed true exhibits; the first involved a copy of the decision of the Patent Office Board of Appeals, and the second a copy of the transcript of the trial judge's charge to the jury.

[3]Respondent Warner states (Warner Br. 38) that the right to copy tapes was "posed directly" in *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971). In that case, like *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973), cited by respondents NBC et al., the data to which the applicants desired access was stored on computer tape. In both cases, the courts

[footnote continued]

used as trial exhibits, therefore, demonstrates that the use of those materials as evidence does not render them available to the press and the public for copying. At the very least, the traditional treatment of these materials dispels any notion that there exists a "fundamental" or "long standing" right of the public to copy and distribute them, as stated by the court of appeals. (Pet. App. 17a.) Indeed, the treatment given to other types of voice recordings in the custody of district courts suggests just the opposite.

For example, the broadcast of court reporters' tape recordings of trials would seem to serve the interests of maximum trial publicity far more than broadcast of the tapes at issue here. Yet the universal practice is not to permit these recordings to be copied for publication. The respondents offer varying rationales for this prohibition. Respondent NBC points to the "limited purpose" of such recordings – to "augment . . . the accuracy of reporters' stenographic transcriptions." (NBC Br. 29.) The production and use of these presidential recordings at trial also had a "limited purpose" which did not encompass their broadcast and distribution; that purpose was to satisfy "the constitutional need for relevant evidence in criminal trials." *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974). Respondent Warner, on the other hand, contends that the bar against copying a court reporter's recording is

held that convenience dictated allowing the applicants to copy the computer tapes rather than being forced to review the back-up documentary material. The difference between computer tapes containing voting registration and tax assessment information, and voice recordings of individuals which are susceptible to broadcast and manufacture into phonograph records without the participants' consent, would seem too plain to warrant discussion.

"by no means universal" and that the matter is "apparently" left by most district courts "to the discretion of the trial judge." (Warner Br. 38.) Warner cites, however, not one instance in which such copying has been permitted, and in effect concedes that the only courts which have dealt with the matter by rule have *prohibited* copying, at least for purposes of "radio or television broadcast." Second, Warner makes the cryptic observation that a court reporter's recording is distinguishable from recorded conversations played in evidence because it does not "play any significant role in the proceeding itself." (*Id.*) But Warner's basis for demanding the tapes here, in addition to the transcripts it already has, is that the tapes are a "true and verbatim record" containing "accurate and objective information about one of the most important public events in American history." (Warner Br. 42.) That is far more true of a court reporter's tape – an aural recording of the entire trial – than it is of the exhibits which constituted only a part of the evidence at that trial. Simply put, the respondents offer not a single credible basis for holding that subpoenaed voice recordings are subject to a "precious common law right" of the public to obtain copies, whereas a court reporter's tape of the trial itself – or, for that matter, a recording of oral argument in this Court (see App. 104-105) – is not.[4]

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[4]The respondents contend that the almost universal prohibition against televising or broadcasting trial proceedings is distinguishable from the matter of broadcasting voice recordings played in evidence at a trial because that prohibition is designed to prevent disruption of trial and distraction of the participants. That argument, however, fails to account for the prohibition on post-trial broadcasting of a tape recording routinely made by the court reporter. The rationale that *does* support that prohibition is equally applicable to the tape recordings involved in this case:

[footnote continued]

3. The Interests Said to Be Served By Broadcast and Sale of the Tapes Do Not Justify Dissemination By the Court of Recordings in Its Custody.

The personal interest that Mr. Nixon seeks to protect here is, put very simply, the mental anguish of having his intimate conversations – containing, in the words of Justice Harlan, the "frivolous, impetuous, sacrilegious, and defiant discourse . . . that liberates daily life"[5] – packaged, broadcast and sold for popular entertainment around the world.[6] While the respondents, like the court of appeals, prefer to characterize Mr. Nixon's concern as a desire to prevent exposure of "misconduct or questionable conduct" (Pet. App. 22a; see Warner

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namely, preventing the exploitation and embarrassment of parties and witnesses by mass distribution of their live, though involuntary, performances at trial. As stated by the American Bar Association's Committee on Professional Ethics and Grievances in its opinion disapproving radio broadcasting of trials, "Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience." (Statement quoted in *Estes v. Texas*, 381 U.S. 532, 597 (1965) (Appendix to concurring opinion of Justice Harlan).)

It should also be noted that where experimentation with televising trials is permitted, it is to be done only with the consent of the parties *and* the witnesses. Code of Judicial Conduct, Canon 3(A)(7)(c).

[5]*United States v. White*, 401 U.S. 745, 787 (1971) (dissenting opinion).

[6]A similar interest of a defendant in being free of televised broadcast of his trial was recognized in *Estes v. Texas*, 381 U.S. 532, 549 (1965): "The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him . . ."

Br. 85, NBC Br. 45), they do not seriously question the actuality or legitimacy of his true interest. Rather, they contend that neither the personal interest of Mr. Nixon nor the interest in preserving respect for the dignity of the presidential office[7] is "so significant as to justify a denial" of their applications. (Warner Br. 80.)

In meeting this argument on its terms, we do not mean to suggest that the question whether a court should make voice recordings available for broadcast and sale is one to be resolved by balancing the claimed benefits of such dissemination against the personal concerns of those whose conversations are recorded in each particular case.

To leave the issue for decision on this basis not only would be unfair to the individuals whose interests are at stake, but also would divert trial courts from their primary function. The availability of voice recordings in the custody of the clerk for copying by members of the press would likely become, should the decision of the court below be upheld, an often-litigated issue[8] that would add still further burdens to the responsibilities of district judges whose time is better spent on the business of administering justice. The sort of considerations that the respondents and the court of appeals deem appropriate in the balancing process[9] not only

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[7] See our original brief at pp. 47-50.

[8] As we have discussed, in addition to tapes subpoenaed from third parties, future claims of a "precious common-law right" to copy such recordings will involve court reporters' tapes of trials; recordings of wiretapped conversations and other electronic surveillance; tapes of oral arguments on appeal; and recorded depositions in civil cases (see *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975)).

[9] At various times the respondents urge the Court to consider, for example, the "political and historical significance" of the trial

[footnote continued]

leave a court almost totally without a guide for the exercise of discretion, but ensure that it will be the notoriety of the defendant, the sensational aspects of the trial, and the clamor surrounding the demand for copies that will decide the issue.

In weighing the interests in publicity said to support the decision of the court of appeals, it is important to keep in mind that it is a court which is asked to be the vehicle for public distribution of these tapes, and that the function of a court is only incidentally to provide public information. To be sure, as stated by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-492 (1975), the press in reporting court proceedings plays an important role in guaranteeing the fairness of trials and furthering "the beneficial effects of public scrutiny upon the administration of justice," and the power to conduct judicial proceedings in *secret* is one to be sparingly exercised. But "the chief function of our judicial machinery is to ascertain the truth," and like televising of trials, the broadcast and distribution of evidentiary recordings "cannot be said to contribute materially to this objective." *Estes v. Texas, supra*, 381 U.S. at 544. Chief Justice Warren, in his concurring opinion in *Estes*, summed up the matter as follows (381 U.S. at 575):

> "It is argued that television not only entertains but also educates the public. But the function of a

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(NBC Br. 16), the status of the subject as a "public official" rather than an ordinary citizen (Warner Br. 85), the relative similarity of the conversations to "conversations between business associates" rather than "bedroom or other intimate conversations" (NBC Br. 53, quoting the opinion of the court of appeals), and the degree to which the content of the recording has previously been disseminated (*id.* at 54; Warner Br. 86).

> trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process."

The respondents concede that the content of the tapes has already received intensive world-wide publicity, and it was the consensus of the district judges in the court below that the distribution of transcripts would "constitute more than adequate disclosure to the public of what the tapes contained." (Memorandum of Chief Judge Hart, App. 11.) It is said that "voice, inflection and timing" are not adequately conveyed by a transcript (Warner Br. 83), and that "[p]ublic understanding of Watergate requires public familiarity with these tapes" (*id.* at 44).[10] We submit that the effect of broadcasting and marketing these tapes will be to titillate rather than to inform the public, that their use for entertainment will demean rather than promote their character as a historical record of one of the most grave and important trials in American history, and that their dissemination by the court for commercial use will mock the serious judicial purposes for which this Court in *United States v. Nixon, supra,* held they must be produced. Wholly putting aside the effect on Mr. Nixon and the others whose uninhibited conversations appear on the tapes, we submit that a proper balance of the

[10]It is also contended that merchandizing of the tapes will promote scholarly research. But as we have repeatedly stated, this case does not involve any question of access to the recordings for scholarly purposes or even simply to satisfy curiosity, and the currently proposed regulations under the Presidential Recordings and Materials Preservation Act are designed in any event to make these and other presidential recordings available for such purposes.

public interests at stake dictates that the court not become an agent for the commercialization of these presidential recordings.

4. The Respondents' First Amendment Claim Has Been Squarely Rejected By Recent Cases.

In essence, the First Amendment claim of the respondents, based primarily on *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), is that the courts may not prevent the broadcast of "information" that is made available to the public generally; the tapes have been publicly played; and therefore the courts may not prevent their broadcast. This syllogism ignores the difference between playing the tapes at trial and providing copies to the public, and it erroneously equates a direct restraint on publication such as that involved in *Cox Broadcasting Corp.* with a refusal to supply the item requested.

The respondents' arguments are nearly identical to those advanced in *Garrett v. Estelle,* 556 F.2d 1274 (5th Cir. 1977), where a newsman claimed a First Amendment right to film an execution by the State of Texas which he and other selected members of the public were permitted to view on closed-circuit television at the prison. The court rejected the newsman's claims on the authority, *inter alia,* of *Pell v. Procunier,* 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974), and its reasoning is squarely applicable here. The court stated (556 F.2d at 1279):

> "Finally, amicus suggests that the proposed simultaneous closed circuit telecast is a 'publication' and that to prohibit its use in any way, such as by filming, is an illegal prior restraint on

republication. This suggestion is similar to the argument made by Garrett that once he is given access to information by the government, here by closed circuit telecast, the government may not limit the use Garrett may make of the information, such as filming it. But the access granted to Garrett and the other members of the press is limited. Access for the purpose of filming is not provided, and the first amendment does not require that it be provided."

The holding in *Garrett* was underscored in the still more recent case of *United States v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), where newspaper reporters sought access to various exhibits and other matters relating to the trial of former Senator Edward Gurney. The trial court, while permitting the press to inspect exhibits actually introduced in evidence,[11] refused to permit access to exhibits identified but not received in evidence or to the actual transcript of Senator Gurney's grand jury testimony, which was read in part to the jury. The court of appeals rejected the newspapers' claim that such restrictions constituted a prior restraint on the press. Instead, the court found that the press was given every right afforded to the public generally, and it stated that "we do not think that the press has any First Amendment right of access to those matters not available to the public." 558 F.2d at 1209. The court concluded that the trial judge is granted "broad discretion in ordering the daily activities of his court," *id.*, and held that his discretion had not been abused in that case. In an observation particularly pertinent here,

[11]The trial court's order did *not* permit photocopying of the exhibits, and counsel has been advised by the Clerk that copies were not in fact furnished.

the court stated that whereas the press had been furnished a transcript of the portions of Senator Gurney's grand jury testimony actually read to the jury, "[i]t was proper to refuse to require the Clerk to blank out the unread portions of the grand jury testimony and deliver the transcripts so excised to the news media." *Id.* at 1210.

The constitutional arguments of the respondents are, we submit, untenable.[12]

5. The Presidential Recordings and Materials Preservation Act and This Court's Decision In *Nixon v. Administrator of General Services* Have No Bearing on This Case.

The respondents rely on this Court's recent opinion in *Nixon v. Administrator of General Services,* ____ U.S. ____, 97 S.Ct. 2777 (1977), for the proposition that Mr. Nixon retains no legally cognizable privacy interest in tape recordings that have already been made public. The exclusive concern of the Court in that case, however, was whether the Constitution barred a governmental search of the recordings and other presidential materials. It was the "constitutionally protected privacy rights"[13] that this Court was referring to in stating that the privacy claim could not

[12]The respondents' arguments based on the Sixth Amendment are fully answered in our original brief (pp. 44-47).

[13]Whatever the scope of a constitutional right to privacy, it plainly does not encompass all the interests in privacy that have received or should receive legal protection. See concurring opinion of Mr. Justice Stewart in *Whalen v. Roe,* ____ U.S. ____, 97 S.Ct. 869, 881 (1977).

be asserted "as to the documents and tape recordings that [Mr. Nixon] has already disclosed to the public," 97 S.Ct. at 2798. Moreover, the claim under consideration by the Court in *Nixon v. Administrator* related solely to preventing disclosure of the contents of the materials, a claim which logically would have no force once the contents had actually been disclosed. The Court did not address the question of disseminating copies of the tapes to the public, and its opinion cannot be read to mean – as respondents suggest – that Mr. Nixon has no interest that a court may recognize in determining whether to supply aural copies of his recorded conversations to the press and public for whatever use they may deem fit.

Respondent Warner also takes the position that, by reason of the Act and this Court's decision upholding its facial validity, Mr. Nixon "no longer has a cognizable property interest to be asserted against the general public." (Warner Br. 89.) The Act, of course, did not deal with the question of title to the presidential tapes. But in any event, no issue in this case depends on who has title to the recordings. Mr. Nixon's interest in these tapes rests on the fact that they capture his own voice in private conversations, and his standing to contest the disposition which the district court is asked to make of them is firmly established by the fact that they were seized from his personal control by virtue of a judicial subpoena.[14] See, *e.g.*, *Mancusi v.*

[14]Thus it is also irrelevant that the tapes which the respondents seek to copy are themselves copies of the originals (see Warner Br. 29 n.14). To contend that a court's power to disseminate voice recordings against the will of the party from whom they were obtained is enhanced by the act of copying those recordings prior to dissemination would be absurd. The

[footnote continued]

DeForte, 392 U.S. 364, 368-370 (1968). The respondents' argument, if adopted, would mean that an individual whose conversations are captured by electronic surveillance would have no standing to protest their release for broadcast purposes simply because he does not own the tape on which the conversations are recorded. No authority cited by the respondents requires or permits such a result.

Respondent Warner further argues that dissemination of these tapes will further the objectives of the Presidential Recordings and Materials Preservation Act. It happens, however, that the question of permitting copying (and thus broadcast and sale) of the presidential tapes has been the subject of a running and unresolved dispute between GSA and the Congress, which under the Act has the power to veto GSA's proposed access regulations. Though the regulations are not directly involved here, it is instructive to review the remarkable history and present status of this dispute.

GSA's originally proposed regulations provided, in §105-63.404(c), that "No researcher may reproduce or have reproduced sound recordings of the reference copies of the tape recordings . . ." GSA explained that the purpose of this provision was "to prevent unwarranted commercial exploitation of the tape

fact that the tapes are copies made by the court may, however, be relevant to the question whether they may be *retained* by the court rather than returned to the owner of the originals. Mr. Nixon has never claimed a right to return of the court copies of the tapes, nor objected to their retention by the Clerk. Respondent Warner's contention that the petitioner's claim means that "the courts would be barred even from retaining a copy of documentary exhibits in their permanent files" (Warner Br. 32 n.17), pursuant to the *Manual for Clerks of the United States District Courts* or otherwise, is untenable.

recordings." GSA, Report to Congress on Title I, Presidential Recordings and Materials Preservation Act, at G-67 (March 1975). The Senate, however, disapproved the proposed regulations in their entirety. S. Res. 244, 94th Cong., 1st Sess.; 121 Cong. Rec. S 15808 (daily ed. Sept. 11, 1975).

The second set of proposed regulations provided in §105-63.404(b) that reproduction of the tapes would be prohibited "unless such reproduction is authorized by subsequent Federal court decisions concerning these or related tape recordings," but the Administrator of GSA might determine to revoke or modify the restriction after review and report by the Presidential Materials Review Board. These proposed regulations were withdrawn by GSA at the request of the Justice Department,[15] and in April 1976 GSA submitted a third revised proposal. This third set of regulations eliminated the proviso relating to subsequent judicial decisions and gave the Review Board, rather than the Administrator, the power to determine whether the copying restriction should continue beyond two years. The copying provisions, along with six others, were this time disapproved by the House of Representatives.[16]

The fourth and latest set of public access regulations was delivered to Congress on June 2, 1977. Section 105.63.404(c) of these regulations provides, as to

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[15] For good measure the Senate – taking the position that such withdrawal was unauthorized by law – adopted a resolution disapproving seven of the regulations, not including §105-63.404(c). S. Res. 428, 94th Cong., 2d Sess.; 122 Cong. Rec. S 5291 (daily ed. April 8, 1976).

[16] H. Res. 1505, 94th Cong., 2d Sess.; 122 Cong. Rec. H 10043 (daily ed. Sept. 14, 1976).

copying: "Researchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States v. Mitchell, et al.; In re National Broadcasting Company, Inc., et al.*, D.C. Miscellaneous 74-128." The district court, of course, has yet to approve any such procedures, and Congress has yet to act on the latest proposed regulations. At least for the moment, therefore, it appears that by a rather uneasy compromise between GSA and Congress, broadcast and marketing of the hundreds of tapes *not* involved here may depend on the ultimate outcome of this case.

CONCLUSION

For the reasons stated herein and in our original brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON
JAMES E. ROCAP, III

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
Attorneys for the Petitioner.